CHILDREN'S LAW OFFICE

CHILDREN'S LAW REPORT

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Legislative Issue

This issue summarizes new laws related to child maltreatment which were enacted this year by the South Carolina legislature. The two-year legislative session was concluded, so any pending bills will not be carried forward. The 114th General Assembly will convene on January 9, 2001. A date for pre-filing of new bills has not yet been set.

Safe Haven for Abandoned Babies

The *Safe Haven for Abandoned Babies Act* establishes procedures and protections for parents who relinquish custody of an infant at a hospital or hospital outpatient facility. An *infant* is a person not more than thirty days old. Under this Act, which became effective June 14, 2000, hospitals must take temporary physical custody of an infant who is voluntarily left at the facility by a person who does not express an intent to return. A court order is not required, and necessary medical care must be provided. The hospital must inquire as to the infant's medical history and identity of the child's parent, excluding the person leaving the infant. The person who leaves the infant at a hospital is *not* required to disclose his or her identity. The hospital must also notify DSS after taking temporary physical custody of an infant. Hospitals and staff are immune from liability if they comply with all sections of the Act.

Upon being notified that a hospital has taken physical custody of an infant, DSS immediately has legal custody of the child. This does not constitute emergency protective custody, and the provisions of S.C. Code Ann. §20-7-610 do not apply. Rather, additional procedures are spelled out in the Act.

DSS must contact the State Law Enforcement Division to ascertain that the infant has not been reported as missing. DSS must publish notice and send a news release to the broadcast and print media which describes the infant and specifies the date and time of a hearing, at which anyone wishing to assert parental rights must to do so. Notice must also be sent to any person identified as the child's parent.

In this issue:

Within forty-eight hours after obtaining legal custody of a child, DSS must file a petition alleging that the infant has been abandoned and that termination of parental rights is in his or her best interests. A permanency planning hearing is held between thirty and sixty days after the obtainment of legal custody. If the court approves the plan of termination of parental rights at this hearing, the order must require DSS to file a petition for termination within ten days.

A person who leaves an infant at a hospital cannot be criminally prosecuted if that person is a parent or is acting at the direction of a parent, and the infant is left in the physical custody of an employee of the hospital. This does not prevent prosecution for otherwise harming the child however. The Safe Haven for Abandoned Babies Act is codified at S.C. Code Ann. §20-7-85.

Kinship Foster Care

A Kinship Foster Care Program is established under the South Carolina Department of Social Services pursuant to Act No. 219, which became effective February 25, 2000. This program applies only to children who have been removed from their homes and are in the care, custody, or guardianship of DSS. Neither informal kinship care nor private custody actions involving relatives are affected by this legislation.

Under the provisions of this Act, DSS will assist relatives in becoming licensed as kinship foster parents when it is in the child's best interests to be placed with a relative, or when a relative contacts DSS about providing placement for a child. Relatives must also be informed of payments and services available to kinship foster parents. Once licensed, relatives receive payments at the full foster care rate.

A full kinship care licensing study is required prior to approval as a kinship foster parent. All residents of the kinship household who are age eighteen or older must undergo state and federal fingerprint reviews for criminal history. Kinship foster parents must be at least twenty-one years old. DSS may waive this requirement if the prospective kinship care provider is at least eighteen and a partner or spouse living in the home is twenty-one or older.

Kinship foster parents are to be notified of court proceedings, as are other foster parents. They also are to be involved in the development of the child's permanent plan and other plans for services. If the child's permanent plan calls for custody or guardianship to the kinship foster parent, then DSS must provide information about adoption, including financial benefits, to the kinship foster parent.

DSS Administrative Hearings

The South Carolina Department of Social Services promulgated new regulations concerning its administrative hearings, effective July 28, 2000. The regulations permit the Office of Administrative Hearing officers to let children testify, and to make accommodations for their testimony if needed. Also, the new regulations allow children's out of court statements to be used in the hearings, if they comply with S.C. Code Ann. §19-1-180(Supp. 1999). Contested cases of the removal of foster children from foster homes will no longer be heard by the Administrative Law Judge Division but by DSS Office of Administrative Hearings.

Criminal Offenses

On May 1, Governor Hodges signed a bill increasing solicitors' ability to respond to physical maltreatment of children. Act No. 261 makes two significant changes to charging statutes available when a person kills or seriously injures a child.

First, the Act creates a new offense for the infliction of great bodily injury upon a child. To be codified at S.C. Code Ann. §16-3-95, the law defines "great bodily injury" as bodily injury which creates a "substantial risk of death or which causes serious or permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." This new offense is a felony and is punishable by up to twenty years incarceration. It is categorized as a violent crime.

It is also unlawful for a child's parent or guardian, a person cohabitating with the child's parent or guardian, or any person responsible for a child's welfare as defined in §20-7-490(5) to knowingly allow the infliction of great bodily injury by someone else. This is also a felony and can be punished by up to five years imprisonment.

This statute does not apply to corporal punishment which does not cause great bodily injury. It also does not apply to traffic accidents *unless* the driver recklessly disregarded the safety of others.

This Act also amended the Homicide by Child Abuse statute so that it applies to anyone who, while committing child abuse or neglect, kills a child under the age of eleven. As previously written, the statute defined child abuse by referencing the Children's Code, thus limiting its application to a parent, guardian, or other person responsible for the child's welfare. The amended section defines child abuse or neglect as "an act or omission by any person which causes harm to the child's physical health or welfare".

Cost of SLED Checks

Act No. 332, which was approved and effective June 6, 2000, limits the fee that the State Law Enforcement Division (SLED) can charge for criminal record searches conducted for charitable organizations. If the search is certified by a charitable organization, the fee cannot exceed eight dollars. A charitable organization is defined as: (1) a 501(c)(3) tax exempt organization; (2) a bona fide church, synagogue, or mosque; or (3) an organization which has registered under the Solicitation of Charitable Funds Act. This provision will benefit the child-serving organizations which require SLED checks of volunteers and staff.

HIV and Hepatitis B Testing

Act No. 218, which was effective February 25, 2000, provides that a victim who has been exposed to body fluids during a crime may request that the solicitor petition the court to have the defendant tested for Hepatitis B and HIV. Upon the request of the victim, or legal guardian of the victim, the solicitor *must* petition the court any time after charges have been brought. This applies to juveniles as well as adults accused of crimes. The testing cannot be conducted without a court order.

To obtain a court order, the solicitor must show the following: (1) That the victim, or victim's guardian, has requested the testing; (2) That there is probable cause that the defendant committed the crime; (3) That

there is probable cause that body fluids may have been transmitted; and (4) That the defendant received notice of the petition and the right to be represented at the hearing.

Upon obtainment of the court order, the tests must be conducted either by the county health department or the detention facility housing the defendant. Persons and entities administering these tests in accordance with accepted medical standards are immune from civil and criminal liability.

If performed prior to conviction or adjudication, results of the tests can only be released to the solicitor, who shall notify the victim, victim's attorney, defendant, and defendant's attorney. The solicitor shall also report positive test results to the Department of Health and Environmental Control (DHEC) and to the correctional facility housing the defendant. The correctional facility shall use this information only for the purpose of providing medical treatment. DHEC must provide counseling to the defendant and, upon request, to the victim.

If the initial HIV test is negative, the court may, upon the victim's request, order follow-up testing to be performed at six weeks, three months, and six months after the initial test. An order for follow-up testing is terminated if the defendant is acquitted or charges are dismissed.

The cost of testing is the responsibility of the State. If subsequently convicted or adjudicated delinquent, the offender must reimburse the State unless determined to be indigent. Parents of juvenile offenders may be required to reimburse the State.

Results of HIV tests cannot be used as evidence in a criminal trial. However, upon a showing of probable cause that the defendant committed the crime, the court may contemporaneously order the collection of additional samples, such as blood or saliva, for the purpose of scientific testing, including DNA. The results of this scientific testing may be used for evidentiary purposes in court proceedings.

Service of Legal Documents

Act No. 360 provides that summons, complaints, or other legal documents can be served on Sundays. However, they cannot be served upon persons while attending, or going to or from, a church or other religious service on Sunday.

Case Decisions

Special Accommodations for Child Witnesses

In the case of *South Carolina Department of Social Services v. Wilson* (S.C. Ct. App. filed July 17, 2000)(Shearouse Adv.Sh. No. 30 at 39) the court of appeals reversed and remanded a family court order permitting a 17-year-old child to testify about improper touching incidents outside the visual presence of her father. At the trial, the father was placed in another room, where he could hear the girl's testimony but she could not see him. The father had the opportunity to consult with his attorney after direct and cross-examination. The father objected to this procedure and stated it violated his due process right of confrontation. The family court found that the father had abused and neglected the child and his name was placed on the Central Registry of Child Abuse and Neglect.

The court of appeals noted that usually the right to confrontation only applies in criminal matters, but since the result was putting the father's name in the central registry and this could leave a "permanent mark" on him, the due process right of confrontation applied in this family court matter.

The court went on to hold that the family court did not apply the proper procedures in determining whether the child could testify outside the presence of her father. The family court did not hear any testimony about trauma to the child, if she had to testify in the presence of her father, nor did the father have access to counsel while the child was testifying. Also, the appellate court considered the age of the child. The statute allowing testimony to be taped or given in closed court session, S.C. Code Ann. §16-3-1550(E)(Supp.1999), applies to witnesses who are very young or with special needs, and the child in this case was 17 years old.

Although upon first reading this decision might appear to be unfriendly to child witnesses, it actually only serves as a reminder that proper procedures must be followed in making special accommodations. In following these procedures, as clarified by case law and statutes, the defendant's right of confrontation can be balanced with the right of the child to be protected if testifying in front of the defendant will cause severe trauma. Evidence should be presented at the hearing to support a finding that the child would be traumatized if required to testify without special accommodations. Defendants placed outside of the presence of the witness should be able to view and hear the witness, and have continuous access to counsel during the testimony.

Repressed Memory

The *South Carolina Supreme Court in Moriarty v. Garden Sanctuary Church of God* (S.C.Sup.Ct. filed June 26, 2000)(Shearouse Adv.Sh. No. 26 at 9) has permitted an adult to bring a law suit against a church run day care center for sexual abuse she alleges to have suffered there as a child. The trial court granted summary judgment for the church, finding that the case was not filed in a timely manner. The plaintiff appealed and the case was re-instated by the court of appeals in *Moriarty v. Garden Sanctuary Church of God*, 334 S.C.150, 511 S.E.2d 699 (Ct. App. 1999). The church appealed to the supreme court, which upheld the decision of the court of appeals. The issue before the court was the time frame in which the plaintiff had to bring the suit seeking damages for negligent infliction of severe emotional distress, invasion of privacy, negligent supervision, and breach of warranty. The plaintiff brought the case within the three-year statute of limitations from the time the repressed memories surfaced. The defendant day care center argued that she should have brought the suit within one year after reaching the age of 21, since she was a child when the alleged incidents occurred.

The supreme court held that in repressed memory cases, the plaintiff must bring the case "within the required period after the date a reasonable person would have regained sufficient memories to discover her injury." This is called the discovery rule. The day care center took the position that a 3 or 4-year-old child should know that sexual abuse is wrong, and therefore should only have until reaching the age of majority plus one year in which to file any lawsuits. The supreme court rejected this argument and noted that, as early as the 1800s, the literature contained references to repressed memories. The court goes on to say that young children may feel that sexual abuse is wrong, but are powerless at that young age to do anything about it and may repress those memories.

The court stated "the discovery rule exists to avoid the harsh and unjust result of closing the court room doors to a plaintiff whose 'blameless ignorance' resulted in a failure to pursue a cause of action within the limitations period." The case can now proceed to trial.

Adoption Consent

In the case of *Hagy v. Pruitt* (S.C.Sup.Ct. filed March 20, 2000)(Shearouse Adv.Sh. No. 11 at 18) the South Carolina Supreme Court addressed the issue of setting aside an adoption because the biological mother alleged that her consent to the adoption was fraudulently obtained. The court of appeals, in 1998, had overturned the family court order setting aside the adoption. *Hagy v. Pruitt*, 331 S.C. 213, 500 S.E.2d 168 (Ct. App. 1998).

A 16-year-old biological mother signed an adoption consent permitting her father and stepmother to adopt her child. The mother later contested the adoption and, at the family court hearing, testified that she understood her consent was final but said her father threatened her. Her father denied threatening her. Two attorneys from different firms testified they advised the mother as to the contents and meaning of the consent. The written consent in the case complied with S.C. Code Ann. §20-7-1700 (Supp.1999). The family court had held that the adoption should be overturned, and that a guardian *ad litem* was necessary before the mother could sign the consent due to her age.

Upon Writ of Certiorari to the court of appeals, the supreme court held that the one-year timeframe for setting aside an order of adoption does not apply to setting aside an adoption on the ground of extrinsic fraud. S.C. Code Ann. §20-7-1800 (Supp. 1999). Extrinsic fraud, as defined by other cases, is fraud that influences a person not to present a case or prevents a person from being heard in a court action. The supreme court held that the mother's allegation that her consent was fraudulently given was an allegation of extrinsic fraud. The court then analyzed the evidence presented at the family court hearing and determined that there was not clear and convincing evidence to show that the mother's consent was obtained by fraud, so the consent to the adoption was not revocable.

Further, the supreme court held that the mother did not need a guardian *ad litem* when she signed the consent because a guardian *ad litem* is appointed in a court action, and the consenting mother is not a party to the adoption action. Her consent was also not revocable due to her age, according to the court's ruling.

The court did note that this case is in compliance with the amended version of S.C. Code Ann. §20-7-1800 (Supp.1999) which was adopted in 1999. The court also noted that, although it was not an issue in this case, the doctrine of laches would apply in determining if an action to set aside an adoption is barred because it was not timely filed.

This court upheld this adoption because there was no showing of fraud, but the time frames are worrisome. The child was born on August 25, 1991. The final adoption order from family court was issued on June 18, 1992. The action to set aside the adoption was filed on December 12, 1994. The court of appeals' decision was in 1998 and the supreme court's decision was filed March 20, 2000. This means that the legal status of the child was in limbo for eight of her nine years.

Guardian ad Litem Immunity

In the case of *Falk v. Sadler* (S.C. Ct. App. filed June 19, 2000)(Shearouse Adv.Sh. No. 27 at 1) a guardian *ad litem* in a family court custody case was sued in circuit court for negligence, breach of fiduciary duties, and malicious use of the legal process. The case arose from a private divorce and custody action. The parties were married and adopted a son. They had a daughter, by a surrogate mother, who was the biological child of the husband and was adopted by the wife. During the divorce and custody case, the wife requested, with the consent of the husband, that the family court appoint the guardian *ad litem*. The family

court never issued an order of appointment however. The guardian *ad litem* recommended that custody of the daughter be placed with the father and that he be allowed to return to his home in Japan. A property and separation agreement permitted the father to have permanent custody of the daughter and the wife custody of the son. This agreement was adopted as an order of the court.

The wife later filed this action in circuit court against the guardian *ad litem*, stating that the family court did not appoint the guardian *ad litem* and that the guardian *ad litem* had exceeded her duties. The guardian *ad litem* moved for a judgment on the pleadings citing that she had immunity for all her actions under the case of *Fleming v. Asbill*, 326 S.C. 49, 483 S.E. 2d 751 (1997). The circuit court granted the motion of the guardian *ad litem* and the wife appealed. The court of appeals reversed the circuit court and remanded the case for further proceedings. The court of appeals reviewed the Fleming case and noted that immunity only applies if the guardian *ad litem* is acting within the scope of her duties. If a guardian *ad litem* is exceeding the scope of those duties then immunity does not protect the guardian *ad litem*. The court of appeals stated that, since the plaintiff's pleadings alleged that the guardian *ad litem* exceeded the scope of her duties, this raised issues of facts to be decided by the court.

The wife also raised the issue that there never was an order from the family court appointing the guardian *ad litem*. The court of appeals found this to be immaterial since both parties asked that the guardian *ad litem* be appointed, her recommendations were noted in the *pendente lite* custody order, and her fees were a part of the court order as well. Therefore, the guardian *ad litem* could raise the immunity issue despite having no order of appointment.

This case serves as a reminder that guardians *ad litem* are not protected from liability when they act beyond the scope of their duties. The court of appeals also stated that a recommendation by a guardian *ad litem* even when against one party is not the basis for a cause of action against the guardian *ad litem*.

Grandparent Visitation

The United State Supreme Court addressed the issue of visitation rights of grandparents in *Troxel v. Granville*, 120 U.S. 2054 (2000). This case concerned a visitation dispute between the paternal grandparents of two young girls and their mother. The mother and father were never married but the grandparents visited with the girls regularly even after the parents separated. The father of the girls later committed suicide. Eventually, the mother remarried and her new husband adopted the girls.

The paternal grandparents were told by the mother that she wanted to reduce their visits to just one short visit a month, so the grandparents filed for visitation under a Washington state statute. The statute allowed any person to petition for visitation rights if it was in the best interests of the child. The mother did not oppose the visitation by the grandparents, but wanted it limited to one day per month and special holidays. The lower court granted visitation to the grandparents of one weekend per month, a week during the summer, and time on their birthdays.

The mother appealed to the Washington Court of Appeals, which reversed the grandparents' order of visitation and dismissed their petition. The grandparents appealed to the Washington Supreme Court, which upheld the court of appeals' decision. The grandparents then appealed to the U.S. Supreme Court.

The U. S. Supreme Court, affirming the decision of the state court, held that parents have the fundamental due process right to the care, custody, and control of their children. The Supreme Court recounted numerous cases which have held that the state has no reason to intervene in the childrearing decisions of parents unless there is a finding that the parents are unfit. There were no allegations of

unfitness here, but only a dispute as to how much visitation the grandparents were entitled to have. Therefore, the end result was that the mother and her new husband have the right to decide whether their daughters will visit the grandparents at all.

In South Carolina, grandparents have the right to seek visitation when the parents live separate and apart, are divorced, or if one parent is deceased. S.C. Code Ann. §20-7-420(33)(Supp. 1999). The court must find that the visitation is in the best interest of the child and that it does not interfere with the parent/child relationship. The court must also consider the relationship between the child and grandparents before the filing of the visitation action.

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